

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CRIMINAL DIVISION)
CRIMINAL APPEAL NO. 0123 OF 2015

(From Makindye Court, Criminal Case No. 407/2015)

CHOUR MOHAMMED :::::::::::::::::::::::::::::::::::APPELLANT

VERSUS

UGANDA ::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. MR. JUSTICE J.W. KWESIGA

JUDGMENT:

The Appellant, a Lebanese National, described as a Broker with **ALIAHMED** was charged and prosecuted on 11 counts that included;-

1. Obtaining money by False Pretences Contrary to Section 305 of the Penal Code Act.
2. Forgery Contrary to Section 342 of the Penal Code Act.
3. Uttering false documents Contrary to Section 351 of the Penal Code Act.

These three offences constitute the eleven (11) counts which I do not find necessary to reproduce in this judgment as they all appear in the charge sheet dated 19th May 2015.

The Accused/Appellant pleaded not guilty to each and every allegation in the charge sheet.

After the protracted trial, the Trial Chief Magistrate, his Worship Richard Mafabi (R.I.P) found the Accused/Appellant guilty and convicted him as follows:-

"It is further court's finding that the Accused person forged all the documents that he ultimately uttered to the Complainant. Against the backdrop court reaches the following decisions:-

- (a) The Accused is found guilty on the first count and convicted on obtaining money by false pretences C/s. 305 of the Penal Code Act*
- (b) He is found guilty of Forgery C/s. 342 of the Penal Code Act on count 4 (four) and he is convicted of the offence.*
- (c) He is guilty of uttering a False Document C/s. 351 of the Penal Code Act on count 5 (five) and convicted as charged.*
- (d) The Accused is guilty of Forgery C/s. 342 of the Penal Code Act on count 6 (six) and convicted.*

(e) *The Accused is guilty of uttering a false document C/s.351 of the Penal Code Act on count 7 (seven) and convicted.*

(f) *No adequate evidence on counts 2,3,7,9,10 and 11 he is acquitted".*

Following the above conviction the trial Magistrate passed the following sentences;-

- (a) Count 1: Sentenced to 15 years imprisonment.
- (b) Count 4: Sentenced to 3 years imprisonment.
- (c) Count 5: Sentenced to 3 years imprisonment.
- (d) Count 6: Sentenced to 3 years imprisonment.
- (e) Count 7: Sentenced to 3 years imprisonment.

On each of the sentences he subtracted the remand period of 5 months and 20 days and the sentences to run CONCURRENTLY.

Therefore, 4 years and 6 months imprisonment became the aggregate term to be served after the subtractions. The trial Magistrate, pursuant to S.197 (a) of M.C.A Ordered the Convict/Appellant to refund to the Complainant a sum of US\$ 66,291.

The Convict/Appellant filed two grounds of Appeal:-

1. That the Trial Magistrate erred in Law and fact when he failed to properly evaluate the evidence as a whole, thereby coming to an erroneous decision.
2. The trial Magistrate erred in Law and fact when he harshly sentenced the Accused and in addition Ordered that he refunds USD.66.291 to the Complainant. The Appellant seeks that the appeal be allowed, conviction be quashed and sentence be set aside.

At the hearing of this appeal Mr. Mugisha Vincent represented the Appellant while Miss Nandaula Lilian, State Attorney appeared for the Respondent.

Mr. Mugisha gave the trial Magistrate's judgment a general criticism and argued that the Magistrate made erroneous decisions.

Ms. Nandaula, on the other hand concentrated on the counts on which there were convictions, evaluated the supporting witnesses' testimonies and submitted that the convictions were proper and sentences were legal and appropriate because the trial Magistrate gave reasons why he so

sentenced.

The fundamental criticism of the of the trial Magistrate's judgment is the alleged failure to properly evaluate the evidence as a whole thereby arriving at a wrong conclusion/decision. Almost in every appeal preferred against a trial court's decision, allegations of failure to evaluate evidence on record appears as one of the grounds. What is evaluation of evidence then?

In my view, evaluation of evidence is examination of the evidence of both the prosecution and defence which includes documental, oral testimony and where available circumstantial evidence in the case as a whole that helps to prove or establish a fact to the satisfaction of the court that the fact has been proved beyond reasonable doubt in case of a criminal trial or on a balance of probabilities in case of civil proceedings.

This process calls for examination of evidence of prosecution and defence on the same point together and where there is a conflict in the evidence produced to prove the same point, the trial court should explain why one has been preferred against the other or what impact the evidence in rebuttal has had on the first evidence and what conclusion necessarily arises from that mixture. The decision derived from such mixture or evaluation must logically flow from the evaluation and not far fetched lest it becomes erroneous conclusion.

This court is guided by the long settled principles followed by first appellate courts like this one. This court is obliged to subject the evidence on record of the trial court to fresh, independent and exhaustive evaluation and arrive at it's own conclusion as to whether the convictions and sentences of the lower court were supported by the evidence and if they were, they ought to be upheld and if they were not, they ought to be set aside. See guidelines in the cases ***Panda Versus. (1957) EA 336*** and ***Kifamunte Henry Versus Uganda SCA. 10 of 1992.***

In the instant case where the trial was over 11 (eleven) counts, it is possible to convict the Appellant on some and acquit him on some of the counts and therefore, it is the correct approach that evaluation is not done generally as the Appellant's Advocate appeared to do, but to address, specifically, the evidence on each particular count on which a conviction was made to determine the appropriateness of each individual conviction. The approach that Miss Lilian Nandaula for the state correctly gave this case.

At the trial, the Accused person pleaded not guilty to each count. The moment an Accused person pleads not guilty to a charge, everything in the charge becomes in issue and the prosecution has a burden to prove each element of the offence and the standard of proof is ***proof beyond reasonable doubt***. The High Court of Uganda, in ***Uganda Versus Okello (1992-92) HCB 68. "Beyond reasonable doubt"*** was defined to mean that evidence adduced must carry a reasonable degree of probability of the Accused's guilt leaving only a very remote possibility in his favour. The burden of proof is settled in ***Woolminaton Versus DPP (1935) AC 462—Uganda Versus Joseph Lote (1978) HCB-269 Joseph Kizza & Another Versus Uganda 1978*** and several others.

The Accused persons can only be convicted on the strength of the prosecution evidence and not on the weakness of the defence evidence or lack of it because the burden of proof is always upon the state or the prosecution.

- (a) Count 1: Obtaining money by false pretences C/s. 305 of the Penal Code Act. It is alleged that the Accused person, between the year 2014 and 2014 in Kampala District, with intent to defraud obtained money from Ahamed AN amounting to US\$ 66,291 (about Ug. Shs. 198,873,000/=) by falsely pretending that he was purchasing for him goods from UNDP whereas not.

S.305 of the Penal Code Act provides/- "Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen — commits a felony and is liable to imprisonment for five years".

The elements of the offence include:-

- (i) Obtaining or taking away something capable of being stolen.
- (ii) Taking must be by false pretence.
- (iii) There must be intent to defraud.
- (iv) That the Accused person participated in the commission of the offence.

I will now examine the prosecution evidence but not necessarily following the order in which the witnesses under my examination were called.

- (i) Count vi) alleges that Mohamed Chour between the year 2014 and 2015, in Kampala

forged a contract letter purported to have originated from Toyota Uganda Limited. PW6, Tusiime Joshua (D/AIP) stated he got the document from the Complainant. That the documents were produced a day following the arrest/detention of the Accused on 14th April 2015.

Under cross-examination, this Investigating Officer (D/AIP) stated "— ALI told us that you approached him that Toyota (U) Ltd had offered a vehicle and you needed money to pick it. I did not investigate AH's relationship with Toyota. Toyota admitted the quotation from their company".

PW5 - Anita Asaba, Finance Manager, Toyota (U) Ltd., told court that she did not know the Accused and that the alleged document does not belong to TOYOTA (U) LTD. (See Exhibit P.8) under cross-examination she stated that there in no proof that the Accused obtained this document from Toyota.

In defence, the Accused stated he was arrested on 14th April 2015, detained at Katwe Police Station. That the documents exhibited as made uttered by him were dated 17th April 2015 yet he was arrested on 14th April 2015.

The Prosecution Exhibit P. 10 the "Suspect's statement" is dated 16th April 2015 and the charge sheet was sanctioned on 23rd April 2015. I find it as a fact that between 14/4/2015 and 23/4/2015 a period of about 9 days the Accused person was not at large to engage in any document making or procurement. However, the Toyota document date is 30/3/2015. The trial Magistrate in evaluation of evidence on this count stated ***"To disregard the Accused defence, court observed that the individual transactions were but just a string of one objective, it was the ultimate business of supplying to UNDP adhesive cement while on the other hand, Saulen Investment securing and/or procuring used products from UNDP. The***

Toyota(U) Ltd. Vehicle was closely associated with this transaction". This particular part of the judgment exhibited erroneous evaluation of the evidence as a whole and specifically on count 6 regarding Toyota (U) Ltd. The Prosecution evidence did not establish that the Accused person participated in the making of this document. The Investigating Officer PW6 contradicted PW5. PW5, Toyota official denied this document as being their document yet PW6 said that Toyota had admitted the document as theirs.

Apart from the Complainant who was not investigated in connection to Toyota, there is no other evidence connecting the Accused person to Toyota or the document in this court. With due respect to the trial Magistrate, it is wrong in criminal trial to generalize proof of a criminal liability using evidence on one count to convict on the others as the above quoted portion of his judgment shows. Each count constitutes an independent offence that is why it is possible to acquit on one count and acquit on others.

This was defective evaluation and I find that as a result of this, he arrived at a wrong conclusion in that the Accused is guilty of forgery of the letter from Toyota and uttering the letter to AN, the Complainant as preferred in counts vi and vii of the charge sheet. This conviction is set aside.

The trial Magistrate got in danger of making sweeping judgment without supporting evidence when he stated as his fundermental decision in these words:- ***"PW's evidence that the Accused kept him busy producing cement in a hope of signing a***

contract with UNDP-----As seen from the new and old appealing deals that cropped up one after another, smartly orchestrated by the Accused and in the circumstances could not detect the fraud. Having found that the exhibits were given to the Complainant by the Accused, court also agrees that the monies and figures indicated thereon is what the Complainant gave to the Accused".

I agree that money is something capable of being stolen. Under S.305 of the Penal Code it is essential to prove that the Accused person obtained each and every alleged sum of money that added up to US.\$ 66,291 that the trial court Ordered to be refunded. Right from the testimony of PW1, AN, it was clear that he wanted to recover money from the Accused through this court's Order.

In my view, the prosecution had a duty to prove the element of obtaining money beyond reasonable doubt and each amount allegedly obtained ought to have been *particularly* and *specifically* proved beyond reasonable doubt and like all criminal proceedings, any doubt entertained on any of the allegations must be resolved in favour of the Accused person.

Reliefs that were sought by the Complainant and were granted by the trial Magistrate under S.197(1) of the M.C.A (Cap.16) requires that evidence be available that proves that the substantial compensation is, in the opinion of the court recoverable by that person by Civil Suit. In my view, these being alleged monies in several transaction, in the Civil Suit, the Complainant would be under duty to specifically and particularly plead and prove these claims as 'special damages' ought to be proved.

In the instant case, the Criminal Magistrate appeared to have erroneously lowered the standard of proof when he held the monies appearing in the figures on the documents the Complainant stated were given by the Accused is proof of what the Complainant gave to the Accused.

I have found it not credible that the Complainant handed over to the Accused person on several occasion, in his office and outside office several payments or different amounts, at different times and for different purposes without any single record.

No voucher was signed, no acknowledgement was made by the Accused person at any single occasion. The Complainant produced photocopies of documents allegedly given to him by the

Accused persons from the third parties. Both the Accused persons and the alleged sources denied these documents. These documents thought denied originate from different institutions e.g UNDP and Toyota (U) Ltd.

The Accused person was not proved to have any dealings, connections or interests in this institutions. He is not known to have been to any of them. This renders the prosecution's story doubtful that the Accused is the origin of these documents. It is too casual to believe the Complainant against the Accused person's version. All other prosecution witnesses were unable to link the Accused persons to the documents that the Magistrate relied on. The other witnesses who allegedly assisted the Complainant to see or handover money to the Accused person were not credible. They did not know the amounts or the purposes. None of them incriminated the Accused in a conversation that could have corroborated the PW1, Complainant's story. I have considered this with prosecution exhibit P. 10 and the defence evidence as a whole. It is not denied that the Accused person was known to the Complainant. Their contact was over Accused's seeking assistance over paying for a container charges.

The documents allegedly given to the Complainant by the Accused pretending to originate from UNDP appear (some of them) to have some signature. The police ought to have these subjected to tests by handwriting experts. Alternatively, police should have investigated whether they were made by the Accused person or under his control. Forgery can be proved by direct evidence by those who saw the document being made, by scientific method or forensic expert witnesses or by circumstantial evidence that would establish that it is only the Accused person who could made the document and not anyone else. In the absence of the preferable direct evidence and forensic evidence, the circumstantial evidence remaining is very weak.

It would only be that it is the Accused person because the Complainant said so. This does not rule out a possibility that it was the Complainant or anybody else under his control or direction to fabricate the Accused for purposes of a desire to recover the sums claimed. This is corroborated by the defence evidence that while the Accused was in prison the Complainant and others attempted to prevail over him to execute an agreement to pay the claimed sums which he declined.

In my view, the trial Magistrate relied on the alleged willingness to reach a settlement as an admission of guilt. This is basing a conviction on extraneous factors. The Accused pleaded not guilty and he explained in details that his utmost interest was to gain his liberty, he was prepared to pay for his liberty but not that he was guilty. This would have been an acceptancy illegally obtained.

Finally, I will re-state the settled principle in Criminal trials that once an Accused person pleads not guilty, everything contained in the charge sheet becomes in issue and the burden of proof on any point or fact that ought to be proved lies on the prosecution. The Accused person cannot be convicted on a weakness of defence or lack of defence but on the strength of the prosecution case. From the above discussion as a whole, my finding is that the trial Magistrate did not properly evaluate the evidence in this case as a whole and arrived at a wrong decision.

In the circumstances, the convictions on the counts set out in the judgment of the lower court is quashed, sentences and Orders made by the trial Magistrate are hereby set aside. The Appeal is allowed. Appellant is acquitted.

Dated this 15th day of May 2017

J.W. Kwesiga
High Court Judge
15/05/2017

In the presence of Mr. Mugisha for Appellant

Appellant present

Ms. Lilian Nandaula – State Attorney

In the presence of:-

/ Mr. Mugisha Vincent for Appellant s Appellant present
s Ms. Lilian Nandaula - State Attorney for state.